SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~/1965

No. ~~817~~ 44

GERALD SEGAL, INDIVIDUALLY AND D/B/A SEGAL COTTON PRODUCTS, ET AL., PETITIONERS,

vs.

WILLIAM J. ROCHELLE, JR., TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MAY 27, 1965

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In the matters of

Gerald Segal, Individually and d/b/a
Segal Cotton Products.

No. 4951 Bankruptcy

Sam Segal, Individually and d/b/a
Segal Cotton Products.

No. 4952 Bankruptcy

Segal Cotton Products, A partnership
Composed of Gerald Segal and Sam Segal.

No. 4953 Bankruptcy

Henry Klepak, 1509 Mercantile Bank Building, Dallas, Texas, Representing the Bankrupts.

William J. Rochelle, Jr., Trustee in Bankruptcy for said Bankrupts, Republic Bank Building, Dallas, Texas.

Elmore Whitehurst, Referee in Bankruptcy, Federal Building, Dallas, Texas.

[fol. 2] Clerk's Certificate (omitted in printing).

In the United States District Court
For the Northern District of Texas

Certificate of Review—Filed June 19, 1963

To the Honorable Judges of Said Court:

I, Elmore Whitehurst, Referee in Bankruptcy, before whom the above cases are pending respectfully certify that in the course of said proceedings I made an order on June 4, 1963, denying claims of the bankrupts to certain tax refunds. On June 12, 1963, within the time authorized by law the bankrupts filed a petition for review of the order and paid the required filing fee of $10.

[fol. 3] Accordingly, I do hereby certify the following, attached hereto:

1. Question Presented.

2. Findings of Fact.

3. Conclusion of Law.

4. Opinion of Referee.

5. Claim of Gerald Segal to tax refund.

6. Alternative claim of Freida Segal, wife of Gerald Segal, to tax refund.

7. Claim of Sam Segal to tax refund.

8. Alternative claim of the estate of Dennie Segal, deceased wife of Sam Segal, to tax refund.

9. Trustee's objections to applications of bankrupts for recovery of tax refunds.

10. Stipulation.

11. Order denying claim of bankrupts to tax refund, signed and entered June 4, 1963. This is the order sought to be reviewed.

12. Petition for Review.

[fol. 4] Dated at Dallas, Texas, this 18th day of June, 1963.

Elmore Whitehurst, Referee in Bankruptcy.

1. *Question Presented*

Whether the bankrupts are entitled to income tax refunds for losses incurred during the year in which the petition in bankruptcy was filed or such refunds are assets of the bankrupt estates.

2. *Findings of Fact*

Gerald Segal, individually and doing business as Segal Cotton Products, No. 4951, Sam Segal, individually and doing business as Segal Cotton Products, No. 4952, and Segal Cotton Products, a partnership composed of Gerald Segal and Sam Segal, No. 4953, all filed voluntary petitions in bankruptcy in this court on September 27, 1961.

William J. Rochelle, Jr., was appointed trustee in bankruptcy in all three proceedings and duly qualified.

During the year 1961, prior to the filing of the petition on September 21, Segal Cotton Products incurred losses, as a result of which the trustee filed claims for carry back adjustments with the Internal Revenue Service and secured certain tax refunds.

Claims to these refunds were filed by the bankrupt, Gerald Segal and his wife, Freida, and by the bankrupt, [fol. 5] Sam Segal and the estate of his deceased wife, Dennie Segal, which claims were opposed by the trustee.

Alternative claims to one-half of the refunds were made by the wife of Gerald Segal and the estate of the deceased wife of Sam Segal. The alternative claims were disallowed and have not been pursued on this petition for review.

Additional facts necessary or helpful to the determination of the legal question involved in this review are contained in a stipulation with attached exhibits signed by the trustee

and the attorney for the claimants, and filed in this court on June 4, 1963. The stipulation, which is attached to this certificate, is found by the court correctly to state the facts and is adopted as part of its findings of fact.

After a hearing, and consideration of the stipulation, an order denying the bankrupts' claims was entered on June 4. This is the order sought to be reviewed.

3. *Conclusion of Law*

Claimants are not entitled to the tax refunds but they are assets of the bankrupt estates.

4. *Opinion of Referee*

Section 70a of the Bankruptcy Act provides in part:

> "The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act * * * to [fol. 6] all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * * (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property * * * ."

In the case of *In re Sussman,* 289 F. 2d 76 (3d Cir. 1961), the United States Court of Appeals for the Third Circuit held that a tax refund which was paid because of losses sustained during the year in which the bankruptcy petition was filed went to the bankrupt and not to the trustee. The court pointed out that there is no provision in law that bankruptcy terminates a taxable year, and said that therefore "when Sussman filed his bankruptcy petition he had

no 'right of action' against the United States for the trustee to acquire under Section 70, sub. a(5) or (6)." The court found that this was a contingent claim against the United States which the court said could not be assigned.

The court conceded that the "unfortunate result" of its ruling was a windfall to the bankrupt at the expense of the creditors and commented:

> "The fact that the very business losses which destroyed normal capacity to pay creditors have led to the tax rebate, makes it particularly unfair that this fund should be beyond the reach of the bankrupt's creditors. Thus, the normally satisfactory provisions [fol. 7] of Section 70, sub. a have inequitable consequences in this very special situation. But we cannot correct this. Such a matter requires a legislative solution."

The facts in the case at bar cannot, in my opinion, be distinguished from those of the *Sussman* case, and if that case was correctly decided then the bankrupts here and not the trustee are entitled to these refunds. But *Sussman* has been severely criticized. I am persuaded by the arguments advanced against it that *Sussman* was incorrectly decided. Therefore, I have declined to follow it and have ruled that these refunds are assets of the bankrupt estates.

The articles to which I have reference are: "Property Which Passes to a Trustee—A Critical Analysis of In Re Sussman" in "Bankruptcy Law—Modern Trends" by Referee Asa S. Herzog of the Southern District of New York, 36 Journal of the National Association of Referees in Bankruptcy, page 18, and "Windfall for Bankrupts: Loss Carryback Claims Do Not Vest in Trustee" originally appearing in the Stanford Law Review and reprinted by permission in 36 Journal of the National Association of Referees in Bankruptcy, page 116. Marked copies of the issues of the Journal containing these articles are attached to this certificate, and I shall not undertake to repeat what they say.

I should like to add, however, that in Texas a contingent claim is transferable by assignment. *Moser* v. *Tucker,* 26 S. W. 1044, 1045; *Wheeler* v. *Riviera,* 49 S. W. 697, error refused. Accordingly, these claims were vested in the trustee as of the filing of the bankruptcy petitions by section 70a [fol. 8] (5) of the Bankruptcy Act unless they were non assignable by reason of being claims against the United States. The Court of Appeals thought that they were non assignable for this reason, but as pointed out in the articles above referred to, two United States Supreme Court decisions to the contrary were not referred to and it can only be presumed that they were not called to the attention of the court and hence overlooked. These cases are *Erwin* v. *United States,* 97 U. S. 392, 397, and *National Bank* v. *Downie,* 218 U. S. 345.

It seems clear that section 72 of the Bankruptcy Act does not require or even permit the inequitable result which the Court of Appeals ascribed to it while deploring the result.

In the Matter of Gerald Segal Bankrupt No. 4951

Filed: April 2, 1963

To the Honorable Judge of Said Court:

Now comes Gerald Segal, bankrupt herein, and files this application for the recovery of tax refunds which are now in possession of William J. Rochelle, Jr., receiver in the above matter, and says:

1.

That the receiver has recovered the sum of $1,608.21 for the year 1959, and the sum of $283.07 for the year 1960, [fol. 9] and that as a matter of law this bankrupt is entitled to said money, and that the receiver has failed and refused to pay same to this applicant, and applicant says

that this Court should in all things order the payment by the receiver of said sums.

Wherefore, Premises Considered, applicant prays that this Court set a day certain for a hearing, and that notice be issued to the receiver to appear and show cause why said money should not be paid to this applicant.

Henry Klepak, Attorney for Applicant, 1509 Mercantile Bank Bldg., Dallas 1, Texas, RI2-9013.

Filed: April 2, 1963

To the Honorable Judge of Said Court:

Now comes Freida Segal, wife of Gerald Segal, and files this her application for the recovery of tax refunds and says:

1.

That in the event should the Court rule against the ap- [fol. 10] plication of Gerald Segal for the recovery of the tax refunds for the years 1959 and 1960, which is in the hands of the receiver, William J. Rochelle, Jr., in that event only, applicant would show that said funds constitute community property and funds and that she was not a bankrupt and that one half of said funds as a matter of law would constitute funds belonging to her and says this Court should set a day certain for the receiver to appear and show cause why, if the Court should not pay said funds to Gerald Segal, why one half of said tax refund should not be paid to this applicant.

Wherefore, Premises Considered, applicant prays that the Court set a day certain for a hearing, and that notice be issued to the receiver to appear and show cause why said money should not be paid to applicant, in the event the tax refunds are not paid to Gerald Segal.

Henry Klepak, Attorney for Applicant, 1509 Mercantile Bk. Bldg., Dallas 1, Texas, RI2-9013.

[fol. 11]

In the Matter of Sam Segal Bankrupt No. 4952

Filed: April 2, 1963

To the Honorable Judge of Said Court:

Now comes Sam Segal, bankrupt herein, and files this application for the recovery of tax refunds which are now in possession of William J. Rochelle, Jr., receiver in the above matter, and says:

1.

That the receiver has recovered the sum of $1,839.41 for the year 1959 and the sum of $505.63 for the year 1960, and that as a matter of law this bankrupt is entitled to said money and that the receiver has failed and refused to pay same to this applicant, and applicant says that this Court should in all things order the payment by the receiver of said sums.

Wherefore, Premises Considered, applicant prays that this Court set a day certain for a hearing, and that notice be issued to the receiver to appear and show cause why said money should not be paid to this applicant.

Henry Klepak, Attorney for Applicant, 1509 Mercantile Bank Bldg., Dallas 1, Texas, R12-9013.

[fol. 12]

Filed: April 2, 1963

To the Honorable Judge of Said Court:

Now comes the Estate of Dennie Segal, deceased wife of Sam Segal, and files this application for the recovery of tax refunds and says:

1.

That in the event should the Court rule against the application of Sam Segal for the recovery of the tax refunds

for the years 1959 and 1960 which money is in the hands of the receiver, William J. Rochelle, Jr., in that event only, applicant would show that said funds constitute community funds and that the estate is entitled to said funds; that the wife of Sam Segal was not a bankrupt and that one half of said funds as a matter of law would constitute funds belonging to her and says that this Court should set a day certain for the receiver to appear and show cause why, if the Court should not pay said funds to Sam Segal, why one half of said tax refund should not be paid to the Estate of Dennie Segal.

Wherefore, Premises Considered, applicant prays that the Court set a day certain for a hearing, and that notice be issued to the receiver to appear and show cause why said money should not be paid to the Estate of Dennie [fol. 13] Segal in the event the tax refunds are not paid to Sam Segal.

Henry Klepak, Attorney for Estate of Dennie Segal, 1509 Mercantile Bank Bldg., Dallas 1, Texas, R12-9013.

Trustee's Objections to Applications of Bankrupts for Recovery of Tax Refunds

Nos. 4951 and 4952

Filed: April 19, 1963

To the Honorable Elmore Whitehurst, Referee in Bankruptcy:

Comes now William J. Rochelle, Jr., duly appointed qualified and acting Trustee in the above entitled and numbered matters and would respectfully file this his objections to the applications previously filed herein on behalf of the Bankrupts for the recovery of certain tax refunds and in support thereof would respectively show:

[fol. 14]

I.

Your Trustee denies, that as a matter of fact or as a matter of law, the Bankrupts are entitled to any funds received by the Trustee as a result of tax loss carryback claims of the Bankrupts.

II.

The Trustee denies that, as a matter of fact or as a matter of law, that the wives of the said Bankrupts are entitled to any portion of said refunds even if said refunds should constitute community property of said Bankrupts and their wives since all community property of the Bankrupts are subject to administration by this Court and are, as a matter of law, subject to the debts of the Bankrupts.

Wherefore, your Trustee prays that the applications of the Bankrupts herein be in all things denied.

Wm. J. Rochelle, Jr., Trustee .

A copy of the foregoing objections were this 18th day of April, 1963, mailed to the Honorable Henry Klepak, 1509 Mercantile Bank Building, Dallas, Texas, Attorney for the Bankrupts.

Wm. J. Rochelle, Jr.

[fol. 15]

STIPULATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

In Bankruptcy

In the Matters of

GERALD SEGAL, individually and doing business as SEGAL COTTON PRODUCTS

No. 4951

SAM SEGAL, individually and doing business as SEGAL COTTON PRODUCTS

No. 4952

and

SEGAL COTTON PRODUCTS, a partnership composed of GERALD SEGAL and SAM SEGAL

No. 4953

Bankrupts

Filed: June 4, 1963

It Is Stipulated and Agreed by and between the trustee, William J. Rochelle, Jr., and Henry Klepak, attorney for Gerald and Freida Segal, and Sam and Denie Segal, as follows:

On September 27, 1961, a voluntary bankruptcy petition was filed on behalf of Gerald Segal and Sam Segal, co-partners, trading under the firm name of Segal Cotton Products. On the same date a voluntary bankruptcy petition [fol. 16] was filed on behalf of Sam Segal, individually, and Gerald Segal, individually. Neither Freida Segal nor Denie Segal, wives of the bankrupts, were adjudicated bankrupts. Both bankrupts and their wives were at all

times material, residents of the State of Texas, and none of the property in controversy herein is the separate property of either of said wives, but all said property is community property.

By agreement between the trustee and the attorney for the bankrupts, the firm of LaFrance, Walker, Jackley & Saville, Certified Public Accountants, of Dallas, Texas, were employed to prepare and file applications for carry-back adjustment. Exhibits 1 through 6, each on U. S. Treasury Department, Internal Revenue Service Form 843, are copies of the claims for refund prepared by said accountants and filed by said bankrupts and their wives, which claims were supported by Exhibits 7, 8 and 9, being the income tax returns for the calendar year 1961 for the individuals and the partnership, Segal Cotton Products. Exhibits 10, 11, 12 and 13 are Notices of Adjustment, U. S. Treasury Form 1331, which issued as a result of said loss carry-back claims. As a result of said claims for refunds the trustee received the following refund checks on the following claims for the following calendar years:

Gerald and Freida Segal, net Operating Loss for 1961, carry-back to 1960	$ 283.07
Gerald and Freida Segal, net Operating Loss for 1961, carry-back to 1959	1,608.21
Sam and Denie Segal, net Operating Loss for 1961, carry-back to 1960	505.63
Sam and Denie Segal, net Operating Loss for 1961, carry-back to 1959	1,839.41

[fol. 17] These funds, by agreement with the attorney for the bankrupts, were deposited in the trustee's bank account to be held by him in escrow pending final determination by this court of the rights of the parties thereto.

By agreement with the attorney for the bankrupt, trustee paid the sum of $1,059.08 to said accountants for their services in obtaining the refund.

The losses giving rise to the refund were incurred by the partnership, Segal Cotton Products and, as shown by Exhibits 7, 8 and 9, the net losses carried back were arrived at by deducting from the partnership losses which were incurred between the period of January 1, 1961 to September 27, 1961, the income of the individual bankrupts earned during the calendar year 1961 from sources other than the partnership, Segal Cotton Products. The various claims for refund, Exhibits 1 through 6, were therefore predicated and based on the entire calendar year 1961.

Dated this 8th day of May, 1963.

Wm. J. Rochelle, Jr., Trustee in Bankruptcy.

Henry Klepak, Attorney for Bankrupts.

[fol. 18]

Order Denying Claim of Bankrupts to Tax Refund

The Trustee herein having received certain funds from the United States Treasurer as a result of loss-carryback claims which claims were allowed and paid, and the individual bankrupts herein, Sam Segal and Gerald Segal, having made application for the recovery of said tax refunds on the grounds that the right thereto or the rights thereto accrued after the date of bankruptcy, and in the alternative that the wives of said bankrupts were entitled to one-half of the said funds, since the refunds were the community property of the bankrupts and their wives, and the bankrupts having appeared through their attorney, and the Trustee having appeared in person, and said attorney and the Trustee having submitted the matter on a stipulation of the facts duly filed herein, and the Court having considered the pleadings, the stipulation, the remarks of counsel and the applicable law and being of the opinion that said application should be denied; it is therefore

Ordered that the applications of the bankrupts for recovery of the tax refunds and in the alternative for recov-

ery on behalf of their wives of one-half of the tax refunds be and the same are hereby in all things denied.

Signed this 4 day of June, 1963.

Elmore Whitehurst, Referee in Bankruptcy.

[fol. 19]

PETITION FOR REVIEW

Filed: June 12, 1963

To the Honorable Judge of Said Court:

On the 4th day of June, 1963 the Referee in Bankruptcy in the above styled and numbered cause entered an order denying the claim of the bankrupts, petitioners herein, Gerald Segal, Sam Segal, and Segal Cotton Products, to a tax refund to which the bankrupts claimed that they were entitled as a result of loss-carryback claims which had been paid. The order reads as follows:

Order Denying Claim of Bankrupts to Tax Refund

"The Trustee herein having received certain funds from the United States Treasurer as a result of loss-carryback claims which claims were allowed and paid, and the individual bankrupts herein, Sam Segal and Gerald Segal, having made application for the recovery of said tax refunds on the grounds that the right thereto or the rights thereto accrued after the date of bankruptcy, and in the alternative that the wives of said bankrupts were entitled to one-half of the said funds, since the refunds were the community property of the bankrupts and their wives, and the bankrupts having appeared through their attorney, and the Trustee hav- [fol. 20] ing appeared in person, and said attorney and the Trustee having submitted the matter on a stipulation of the facts duly filed herein, and the Court having considered the pleadings, the stipulation, the re-

marks of counsel and the applicable law and being of the opinion that said application should be denied; it is therefore

Ordered that the applications of the bankrupts for recovery of the tax refunds and in the alternative for recovery on behalf of their wives of one-half of the tax refunds be and the same are hereby in all things denied.

Signed this 4th day of June, 1963.

Elmore Whitehurst, Referee in Bankruptcy.

Point of Error

Petitioners seek a review of the above order for the reason that same is wholly without basis in law. Petitioners would show that the Referee in entering such order erred in determining on the facts recited in that order that the Trustee, as opposed to the bankrupts, was entitled to the loss-carryback which had been paid.

Argument

This case presents an analogous if not identical fact situation as an earlier case decided by the Court of Appeals of the Third Circuit, *In Re: Susman*, 289 F2d, 77 (1961). As in [fol. 21] that case this case turns upon an interpretation of Section 70, Sub. a of the Bankruptcy Act. That section provides, in relevant part, as follows:

"(a) The Trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title * * * to all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against

him, or otherwise seized, impounded, or sequestered: * * * (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property * * * ."

It was petitioner's position before the Referee, and it is your petitioner's position on review that the loss-carryback funds which were paid were not paid as a result of a right of action which existed at the time of bankruptcy. On September 27th, 1961 a voluntary bankruptcy petition was filed in the petitioner's behalf. It will be noted that the funds paid on the loss-carryback claim were paid on a claim based on the entire calendar year of 1961 and not merely on that period of time that proceeded the date on which the bankruptcy petition was filed. The right itself did not come into existence until the end of the taxable year and until that time such claim was uncertain and undeterminable as to amount, and more importantly, as to its existence for the reason that the bare existence of such [fol. 22] claim was not certain until the end of the taxable year of 1961 and could be no theory on which the Referee could have relied to say such claim asserted at the end of that taxable year was a "contingent claim" as of the date of bankruptcy.

Section 70, Sub a(5) refers to "title" of "property". This concept of title and property connotes an ownership interest in some Res. Here there can be no existing fund to which the Trustee of the estate of the bankrupt, or the Referee by his order, could point to as of September 27th, 1961. Therefore this concept of title to property is not involved in this case.

The conclusion is inescapable that in September of 1961 petitioners had no right of action against the United States and no vested or transferable property in an anticipated claim against the United States within the meaning of Section 70 Sub a of the Bankruptcy Act.

Because this may result in some inequitable windfall to the bankrupts cannot be a basis for the entrance of the

order for which purpose this review is petitioned. If Section 70 Sub a is incapable of rendering the result desired by the Reference only legislation should be allowed to remedy the legislative defect.

Wherefore, Premises Considered, petitioners pray that the order entered by the Referee in Bankruptcy as set out herein be reversed and that the Referee in Bankruptcy is [fol. 23] instructed to enter an order instructing the receiver to pay the proceeds claimed by the petitioners.

Respectfully submitted,

Henry Klepak, Attorney for Petitioners, 1509 Mercantile Bank Bldg., Dallas 1, Texas.

The State of Texas
County of Dallas

Before Me, the undersigned authority, on this day personally appeared Henry Klepak, attorney for the petitioners in the above styled and numbered causes, who states upon oath that the facts and statements as set out therein were related to him by the petitioners and that same are true and correct to the best of his knowledge and belief.

Henry Klepak

Sworn to and Subscribed before me on this 10th day of June, 1963, to certify which witness my hand and seal of office.

Gladys Cobb, Notary Public, Dallas County, Texas.

(Seal)

[fol. 24]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

OPINION OF THE COURT—Filed August 26, 1963

The controversy in this case grows out of a Certificate of Review to this court by Honorable Elmore Whitehurst, Referee in Bankruptcy at Dallas, Texas.

The question presented, in short, is, "Does a carryback tax item under Title 26, 172 of the Revised Annotated Statutes belong to the Trustee for the benefit of creditors, or does it go to the bankrupt?

The Referee held that it belonged to the Trustee, notwithstanding the opinion in the *Sussman* case in the Third Circuit, 289 F. 2d 76. We adopt in part the Certificate of the Referee and the quotations there made by him as follows:

"In the Sussman case the court conceded that the 'unfortunate result' of its ruling was a windfall to the bankrupt at the expense of the creditors and commented:

'The fact that the very business losses which destroyed normal capacity to pay creditors have led to the tax rebate, makes it particularly unfair that this fund should be beyond the reach of the bankrupt's creditors. Thus, the normally satisfactory provisions of Section 70, sub. a, have inequitable consequences in this very special situation. But we [fol. 25] cannot correct this. Such a matter requires a legislative solution.'

"The facts in the case at bar cannot, in my opinion, be distinguished from those of the Sussman case, and if that case was correctly decided then the bankrupts here and not the trustee are entitled to these refunds. * * * I am persuaded by the arguments advanced against it that Sussman was incorrectly decided.

Therefore, I have declined to follow it, and have ruled that these refunds are assets of the bankrupt estates. * * * "

The Referee continues:

"I should like to add, however, that in Texas a contingent claim is transferable by assignment. *Moser* v. *Tucker*, 26 S. W. 1044, 1045; *Wheeler* v. *Riviera*, 49 S. W. 697, error refused. Accordingly, these claims were vested in the trustee as of the filing of the bankruptcy petitions by section 70a (5) of the Bankruptcy Act unless they were non-assignable by reason of being claims against the United States. The Court of Appeals thought that they were non-assignable for this reason, but as pointed out in the articles above referred to, two United States Supreme Court decision to the contrary were not referred to and it can only be presumed that they were not called to the attention of the court and hence overlooked. These cases are *Erwin* v. *United States*, 97 U. S. 392, and *National Bank* v. *Downie*, 218 U. S. 345."

Our view of the case is that of the Referee. Indeed, Judge Hastie, in the closing words of his opinion in the Sussman case, manifestly felt that the strict interpretation of the [fol. 26] statute, as he viewed it, tended to smother the spirit of the law and to stand aside the urging of the principles of equity and fair play. We agree with Judge Hastie that the opinion does result in an injustice to the creditors. We think there is a better way of solving the problem.

Justice Cardozo in *Martin* v. *National Surety Co. et al.*, 300 U. S. 588, leaves open the door for a more satisfactory light upon the question:

"* * * the statute must be interpreted in the light of its purpose * * * . An assignment ineffective at law may none the less amount to the creation of an equitable lien * * * . It would be a strange construction of

the statute that would make it necessary for the Government to declare the equities illusory when they serve its own good."

The syllabus in the Martin case, Section 2 thereof, clearly sums up the effect of the decision:

"2. The provisions of R. S., §3477; 31 U.S.C. 203, declaring all assignments of any claim upon the United States 'absolutely null and void' unless made after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof, are provisions for the protection of the Government, and not for the regulation of the equities of claimants growing out of regular assignments, when collection is complete and the Government's liability ended. P. 594."

[fol. 27] The court in this case says in the Opinion:

"We conclude that Martin's interest in the fund was correctly held to be subordinate to the interests of other claimants."

The Sussman decision, which is in conflict with the Referee's holding, we find is ably discussed and criticized in the Journal of the National Association of Referees in Bankruptcy, issue of October 1962, page 116, from which we quote:

"The admittedly inequitable consequences of the Sussman decision resulted from an incorrect application of section 70 (a)..

"The court reasoned that the carryback claim could not be an existing property interest at the time the petition was filed because section 172 of the Internal Revenue Code bases carryback refunds upon net operating losses for the taxable year. The bankrupt could not have presented his claim until nearly seven months

after his petition was filed. However, his inability to present his claim when the petition was filed should not, in itself, prevent the claim from vesting in the trustee, for it is possible to have an existing interest in property without having an immediate right to enjoy that property. For example, one who holds a note payable at the end of the year has an existing property interest even though he has no immediate right to collect the debt. * * *"

[fol. 28] "The Sussman court's conclusion that the right itself did not come into existence until the end of the taxable year must have been based upon the uncertainty of the claim rather than its immaturity, for the court assumed that the bankrupt could possibly earn enough during the remainder of the year to offset his losses and eliminate the availability of a carryback. Several cases involving claims of far greater uncertainty make it clear that a contingent claim can vest in the trustee. In the leading case of *Williams* v. *Heard* the bankrupt's award for losses caused by the activities of British-built Confederate cruisers was held to have vested in the trustee even though the bankrupt had no enforceable claim at the time of bankruptcy and it seemed unlikely that he ever would have such a claim. The Court reasoned that the bankrupt did have a right to compensation at the time he was adjudicated a bankrupt even though he then had no remedy. In determining that this particular inchoate claim was sufficiently in existence to vest in the trustee the court relied upon the test laid down by Justice Story in *Comegy* v. *Vasse*. * * * If the Sussman court had applied this test, it would have found that the carryback claim was an existing property interest; for, if the bankrupt had died at the time the petition was filed, it is clear that his administrator could have claimed the refund for the benefit of the estate."

"The Sussman court further reasoned that, even if the claim was an existing property interest, it was not

the type of interest which can be transferred or levied [fol. 29] upon, as required for it to vest in the trustee under section 70(a) (5) of the Bankruptcy Act, because the Federal Anti-Assignment Statute forbids the assignment of unallowed claims against the government. However, the Supreme Court decided in *Erwin* v. *United States* that the Anti-Assignment Statute does not prevent such claims from vesting in the trustee in bankruptcy."

The author of the article in the magazine cites authorities thus:

"An immature carryback claim was held to be assignable under ch. XI arrangement proceedings in the case of *In re Kepp Elec. & Mfg. Co.*, 98 F. Supp. 51 (D. Minn. 1951). The debtor assigned all his claims for tax refunds to a receiver for the benefit of the unsecured general creditors. * * * There is no apparent reason why a claim which is sufficiently in existence to be assignable under ch. XI proceedings should not be sufficiently in existence to vest in the trustee under § 70 (a)."

"Since the Sussman case arose in Pennsylvania it may be significant that the Pennsylvania courts have held that contingent remainders are subject to execution and do vest in the remainderman's trustee in bankruptcy. E. G., *In re Packer's Estate,* 246 Pa. 116, 92 Atl. 70 (1914) (bankruptcy); *De Haas* v. *Bunn,* 2 Pa. 335 (1845) (execution). In the *Dorgan* case, (237 Fed. 507), supra, the court said: 'Such interest is a property right—contingent, it is true, as to the amount and [fol. 30] value thereof, and subject to be entirely defeated, but nevertheless a property right . . . The trustee, or purchaser from him, simply stands in the shoes of the bankrupt, receiving something, or possibly nothing, ultimately; but it is a right which should have a value, and, having a value, under the policy of the law, in case of bankruptcy, it passes to the trustee for the

benefit of creditors. *The whole policy of the Bankrupt Act is that all nonexempt property of the bankrupt . . . shall be subjected to the payment of the debts of the bankrupt.'* 237 Fed. at 509. (Emphasis added.)"

The general purpose and policy of the Bankruptcy Act, from its incipiency has been, and is that all property of the bankrupt shall be subject to the payment of his debts. As suggested by the authorities quoted, had the bankrupt died solvent, his legal representative should and would have listed his claim and collected it. Nowhere else could the fund have gone except to his estate, if he had been solvent. Since he is insolvent, it must go to his creditors.

T. Whitfield Davidson, United States District Judge.

[fol. 31]

In the United States District Court

For the Northern District of Texas

Order Affirming Referee on Petition to Review—Filed August 27, 1963

The Referee in Bankruptcy in the above styled and numbered matters having entered an order on the 4th day of June, 1963, denying the claim of the above named bankrupts that they were entitled to the proceeds of a tax refund resulting from loss carry-back claims paid by the Director of Internal Revenue, and said bankrupts having duly and timely filed their petitions to review said order, and the Referee in Bankruptcy having filed his certificate on review, including his Findings of Fact, Conclusions of Law and Opinion, and the Court having considered said petition and certificate, and being of the opinion that said order should be in all things affirmed and approved, it is therefore

Ordered, Adjudged and Decreed that the order of the Referee in Bankruptcy entered the 4th day of June, 1963,

denying the claim of the above named bankrupts to the proceeds of said loss carryback claims be and the same is hereby in all things affirmed and approved in accordance with the opinion of the Court heretofore rendered and filed.

Signed this 27 day of August, 1963.

T. Whitfield Davidson, United States District Judge.

[fol. 32]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

In the Matter of

GERALD SEGAL, Individuall and d/b/a SEGAL COTTON PRODUCTS

No. 4951

SAM SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS

No. 4952

and

SEGAL COTTON PRODUCTS, A Partnership Composed of GERALD SEGAL and SAM SEGAL, Bankrupts

No. 4953

NOTICE OF APPEAL—Filed September 25, 1963

Notice is hereby given that Gerald Segal, individually and doing business as Segal Cotton Products, Sam Segal, individually and doing business as Segal Cotton Products, and Segal Cotton Products, a partnership, hereby appeal to the United States Court of Civil Appeals for the Fifth Circuit, from the order affirming Referee in Bankruptcy on Petition for Review in the matters of Gerald Segal, Indi-

vidually and doing business as Segal Cotton Products, No. 4951, Sam Segal, Individually and doing business as Segal Cotton Products, No. 4952, and Segal Cotton Products, a partnership No. 4953, entered on the 27th day of August, [fol. 33] 1963 by the United States District Court for the Northern District of Texas, Dallas Division.

Henry Klepak, Attorney for Appellants, Gerald Segal, Sam Segal and Segal Cotton Products, Bankrupts, 1509 Mercantile Bank Building, Dallas 1, Texas.

In the United States District Court

For the Northern District of Texas

Bond for Costs on Appeal—Filed September 25, 1963

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to William J. Rochelle, Jr., Trustee, the sum of Two Hundred Fifty ($250.00) Dollars.

The condition of this bond is that, whereas the Bankrupts have appealed to the Court of Appeals for the Fifth Circuit by notice of appeal filed day of September, 1963, from an order affirming Referee in Bankruptcy on Petition for Review entered on the 27th day of August, 1963, if the bankrupts shall pay all costs adjudged against them if the appeal is dismissed or the order affirmed or such costs as the appellate court may award if the order is modified, then this bond is to be void, but if the bankrupts fail [fol. 34] to perform this condition, payment of the amount of this bond shall be due forthwith.

Gerald Segal and Sam Segal, Individually and doing business as Segal Cotton Products.

(Illegible), Attorney, Lawyers Surety Corporation.

E. M. Austin, Atty.-in-Fact, Surety.

Lawyers Surety Corporation
10th Floor
Fidelity Union Tower
Dallas 1, Texas

Bond No. 114971

(Seal)

Signed and acknowledged before me this day of , 1963.

[fol. 35]

Law Offices
Henry Klepak
15th Floor, Mercantile Bank Bldg.
Dallas 1, Texas

September 26, 1963

Associates:
Thomas F. Nash
Jack Stuart Cole
Norman A. Zable

RIverside 2-9013

Filed: Sept. 27, 1963

United States District Clerk
United States Post Office
Bryan and Ervay
Dallas, Texas

Attention Miss Hamilton

Re: In the Matters of Gerald Segal Et Al, Nos. 4951, 4952, 4953

Dear Miss Hamilton:

Please prepare for us a Statement of Facts to be filed in the above matter, and include in the statement the following statements:

1. Application of bankrupts for recovery of tax refunds.

[fol. 36]

2. Trustee's objections to application of bankrupts.
3. Stipulation of Facts
4. Referee's Order denying claim of bankrupts
5. Petition for Review
6. Certificate of Review
7. Opinion of Court (on review)
8. Order affirming Referee on Petition to Review
9. Notice of Appeal
10. Bond for costs on appeal

Your attention to this request will be greatly appreciated.

Very truly yours,

Henry Klepak

HK/g

[fol. 37]

In the United States Court of Appeals

For the Fifth Circuit

No. 21043

Gerald Segal, Individually and d/b/a Segal Cotton Products, *et al.*,

—versus—

William J. Rochelle, Jr., Trustee.

Minute Entry of Argument and Submission —April 14, 1964

On this day this cause was called, and after argument by Henry Klepak, Esq., for appellant, and William J. Rochelle, Jr., Esq., for appellee, was submitted to the Court.

[fol. 38]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21043

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al., Appellants,

versus

WILLIAM J. ROCHELLE, JR., Trustee, Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before Rives, Bell and Wright,* Circuit Judges.

OPINION—September 9, 1964

BELL, Circuit Judge: This appeal presents a question of prime importance in the administration of the Bankruptcy Act. At issue is whether loss-carryback refunds forthcoming under the federal income tax statutes[1] and arising from losses sustained prior to but in the year of bankruptcy go to creditors or the bankrupt.

[fol. 39] Gerald Segal and Sam Segal, as individuals, filed voluntary petitions in bankruptcy on September 27, 1961. On the same date Segal Cotton Products, a partnership composed of Gerald Segal and Sam Segal, filed a voluntary petition in bankruptcy. The trustee here was duly appointed and qualified in all three proceedings.

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* Of the D. C. Circuit, sitting by designation.

[1] § 172 of the Internal Revenue Code of 1954, 26 USCA, § 172.

Segal Cotton Products incurred losses during the year 1961 prior to the filing of the petition on September 21. The trustee filed claims for loss-carryback adjustments with the Internal Revenue Service in light of income taxes having been paid by the individual partners for the two preceding years. Tax refunds were obtained pursuant thereto, and these were the subject matter of claims filed on behalf of Gerald and Sam Segal which were denied by the Referee.[2] The District Court affirmed, holding that the refunds were assets of the trustee for the benefit of creditors. This holding was contrary to that of the Third Circuit, on similar facts, in the case of *In re Sussman*, 3 Cir., 1961, 289 F.2d 77, and that of the First Circuit in *Fournier* v. *Rosenblum*, 1 Cir., 1963, 318 F.2d 525. This appeal followed.

The question presented is whether the rights to the loss-carryback adjustments passed to the trustee. The bankrupts contend that the rights accrued after the date of bankruptcy since applications for refunds, resting as they must on [fol. 40] the results of the whole taxable year, could not have been filed until the end of the year. The answer depends on whether such a right to refund or adjustment is transferable property within the meaning of § 70a(5) of the Bankruptcy Act, 11 USCA, § 110a(5), in pertinent part as follows:

> "(a) The Trustee of the estate of a bankrupt . . . shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title . . . to all of the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by

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[2] The refunds to Gerald Segal were in the amounts of $283.07 on the 1961 loss-carryback to 1960, and $1,608.21 to 1959. The refunds to Sam Segal were in the amount of $505.63 to 1960, and $1,839.41 to 1959.

> any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: . . . "

It is to be noted that the term "property" as used in this section includes rights of action which could have been transferred prior to the filing of the petition.[3] The court held in *Sussman, supra,* that the right to a loss-carryback adjustment is not property as defined in § 70a; and further, if property, because of the proscription contained in the Assignment of Claims Act, 31 USCA, § 203, it could not have been transferred prior to the filing of the petition [fol. 41] in bankruptcy. In *Fournier* v. *Rosenblum, supra,* the court went only so far as to hold that the right was not embraced in the concept of property as used in § 70a. With deference, and after careful consideration of the reasoning of these respected sister courts, we find ourselves unable to follow their decisions. We hold that the right to a loss-carryback refund or adjustment, although contingent as to amount, is transferable property within the meaning of § 70a(5), and affirm.

We begin with the proposition that it was the intent of Congress to secure to creditors all property of a bankrupt. The refunds here in question will pass to the bankrupts freed from claims of their creditors if such a right is outside the scope of the definition of property as used in the Act. This will be the result in spite of the fact that the refunds arose as a result of losses in the partnership business which in the first place caused the claims of the creditors to come into existence. This windfall to the bankrupts at the expense of the creditors was recognized by the court in *Sussman,* and *Fournier* v. *Rosenblum,* but each court felt that it was a matter which required legislative correction.

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[3] The statute also includes rights of action which could have been levied upon and sold under judicial process, or otherwise seized, impounded or sequestered. In the view we take of the case, any consideration of these qualifications is pretermitted.

Our conclusion stems from a construction which gives effect to the congressional intent. It is true that the refunds flow from newly created rights in the sense that the loss-carryback provision came into the law in 1942, after the enactment of § 70a(5) in 1898. Moreover, such refunds may not be sought until the end of the taxable year in which the [fol. 42] losses arise, and thus the realization of the right is not only deferred but a contingency is posed as to the amount of the loss since conceivably the applicable losses may be reduced or increased after the date of the filing of the petition in bankruptcy.

There is nothing in the language of the statute to indicate that the scope of the definition of property is to be limited to property rights existing when the statute was enacted. This conclusion must be coupled with the fact that the concept of property as used in the Bankruptcy law has been held, over a long period of years, to include rights depending on contingencies. In *William* v. *Heard,* 1891, 140 U.S. 529, 11 S.Ct. 885, 35 L.Ed. 550, the predecessor bankruptcy statute provided that all of the "estate, debts, and effects" of the bankrupt were to be recovered for the creditors. This was said to embrace his whole property. The facts were that during the Civil War the bankrupts had paid extra insurance premiums to cover war risks created by Confederate ships sponsored by Great Britain. In 1871, the United States secured an international reparations award of 15 million from Great Britain to be distributed by Congress as it saw fit. Congress set up a commission to determine distribution of the fund in 1874, and the bankruptcy occurred in 1875. No steps were taken to recover an award for the extra premiums paid until 1882 when Congress expressly provided for such recovery, and the award was made in 1886. The question was presented of ownership of the award as between the assignee of the bankrupts and them individually, they having been dis- [fol. 43] charged in 1877.[4] The court held that the bank-

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[4] Under the bankruptcy practice then in effect the bankrupts were required to make a conveyance of "all [their] estate, real

rupts had at the time of bankruptcy a possibility, coupled with an interest, of recovering the premiums, and that such was property within the meaning of the Act which had passed to the assignee of the bankrupts.

The case of *In re Dorgan's Estate,* S.D., Iowa, 1916, 237 Fed. 507 involved an Iowa will giving the residue to the wife for life, with "full power to use the same . . . as she may see fit," and at the wife's death, remainder to bankrupt of "all the proceeds . . . left." The petition in bankruptcy was filed during the lifetime of the wife. Under Iowa law, this will created a life estate in the wife, with a vested remainder, subject to divestment, in the bankrupt. The court held that the bankrupt's interest passed to the trustee, saying "Such interest is a property right—contingent, it is true, as to the amount and value thereof, and subject to be entirely defeated, but nevertheless a property right, the value of which may be in a way approximated by taking into account the age of the widow and the prospective necessities of her life."

The case of *Kleinschmidt* v. *Schroeter,* 9 Cir., 1938, 94 F.2d 707, presented a situation where the bankrupt was engaged in a joint mining venture, advanced part of his contribution to the venture, but defaulted on the rest. Under the joint venture agreement he thereby forfeited all [fol. 44] interest in the venture, except the conditional right to a return of his prior contribution if the venture made a profit or was sold at a profit. The court held that the conditional right of the bankrupt to a return of his contribution passed to the trustee in bankruptcy by operation of § 70a.

See also *Chandler* v. *Nathans,* 3 Cir., 1925, 6 F.2d 725, which based the passing of an income tax refund claim pending when the bankruptcy petition was filed on the premise that it was a right of action arising from the un-

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and personal" to an assignee. This is to be compared with the present practice of all property of the bankrupt passing by operation of law to the trustee.

lawful taking or detention of property of the bankrupt within the meaning of § 70a(6) of the Act. And *cf. In re Kepp Elec. & Mfg. Corp.*, D. Minn., 1951, 98 F.Supp. 51, a Chapter XI arrangement proceeding, where the debtor transferred various assets to a receiver, including all tax refunds due and owing the debtor from the United States government. The assignment of loss-carryback claims was prior to the end of the taxable year. The Commissioner of Internal Revenue maintained that the transfer of the refund claim was void as violating the Assignment of Claims Act. It was held that this Act did not apply to assignments which occur through operation of law, and that a Chapter XI transfer to a receiver occurs by operation of law. Apparently no question was presented as to whether the assignment might be invalid because of its being contingent, and there was no contest between the receiver and an assignee as distinguished from the government.

Thus it is that these authorities have considered contingent rights as property under the Bankruptcy Act. They [fol. 45] are applicable and persuasive by analogy. We hold that the right to claim loss-carryback refunds under the circumstances of this case is property as that term is used in § 70a(5), notwithstanding that the claim is subject to adjustment in the event the taxpayer has other losses or earnings during the balance of the year, and the claim may not be filed until the end of the taxable year.[5] This right of action springs from and rests on the fact that the income taxes theretofore paid were paid subject to adjustment in the event of future losses, and are available for

[5] A proration of the refund in the ratio of the losses before and after the filing date would be indicated in the event of losses after the filing date. Earnings after the filing date would simply reduce the amount of the refund to the trustee. The fact that the refund claim is unmatured, in the sense that the taxpayer may not file for it until the end of the taxable year, would not appear to prevent the claim from being "property" within § 70a(5). This is an everyday occurrence where notes due and accounts receivable at a future date pass to the trustee in bankruptcy.

that purpose to the end of providing the refund. The right to adjustment is definite; the time for filing the claim is definite; only the amount of the refund is contingent and this meets the test of a possibility vested with an interest set out in *Williams* v. *Heard, supra.*[6]

Accepting that the inchoate right to the loss-carryback refund is "property", this leaves for decision whether it [fol. 46] is property which the bankrupt "could by any means have transferred" within the meaning of § 70a(5) of the Bankruptcy Act. It is not contended that the contingent and defeasible nature of the refund claim prevents it from being transferable. Contingent property interests are, of course, assignable at common law. *In re Landis,* 7 Cir., 1930, 41 F.2d 700; *In re Wright,* 2 Cir., 1907, 157 Fed. 554; see also 6 C.J.S. *Assignments* § 12, and as our preceding discussion demonstrates, contingent interests have been held to pass to the trustee in bankruptcy. The bankrupts do contend, however, that since the Assignment of Claims Act, *supra,* renders null and void assignments of claims against the United States, the right to the loss-carryback refund could not be "transferred" under § 70a(5). As heretofore noted, the Third Circuit in *Sussman* accepted this argument as an alternative basis for its holding that the carryback refund did not pass to the trustee.

It is settled law that the passage of title to a claim against the United States from the bankrupt to the trustee is not such a transfer or assignment as is barred by the Assignment of Claims Act. This is the principle enunciated in the *Kepp Elec. & Mfg. Corp.* case, *supra,* of the non-applicability of this Act to transfers effected by operation of law, and is the progeny of *Erwin* v. *United States,*

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[6] The question under consideration has had the attention of the commentators since the *Sussman* decision. See Herzog, Bankruptcy Law, Modern Trends, Journal of the National Association of Referees in Bankruptcy, Vol. 36, p. 18 (January 1962); XVI Univ. of Miami L. Rev. 345 (1961); 110 Univ. of Penn. L. Rev. 275 (1961); 14 Stanford L. Rev. 380 (1962); and 40 Tex. L. Rev. 569 (1962).

1878, 97 U.S. 659, 24 L.Ed. 1065. The point of the reasoning of the *Sussman* case was that the Assignment of Claims Act would, on the other hand, prevent a transfer of the refund right prior to and aside from bankruptcy, thereby [fol. 47] rendering the right non-transferable within the meaning of § 70a(5).

It is our opinion however, that this conclusion falls in light of the established law that an assignment of a claim or right against the United States is enforceable between the parties to such assignment, in that the bankrupt and the assignee could have entered into an enforceable contract whereby the bankrupt would have been bound to pay over the refund proceeds once he had received them from the government. *Martin* v. *National Surety Co.*, 1937, 300 U.S. 558, 57 S.Ct. 531, 81 L.Ed. 822; *California Bank* v. *United States Fidelity & Guar. Co.*, 9 Cir., 1942, 129 F.2d 751; and *Bank of California* v. *Commissioner*, 9 Cir., 1943, 133 F.2d 428. Thus, at the date of bankruptcy, the Segals were possessed of a valuable property right, capable of being converted into money value. We feel that this was sufficient transferability to meet the requirement of § 70a(5).

The *Sussman* court relied on *Matter of Ideal Mercantile Corp.*, 2 Cir., 1957, 244 F.2d 828, cert. denied, 1957, 355 U.S. 856, 78 S.Ct. 84, 2 L.Ed.2d 63, and *Wooton* v. *United States*, Ct. Cl., 1949, 86 F.Supp. 143, cert. denied, 1950, 339 U.S. 903, 70 S.Ct. 517, 94 L.Ed. 1333, in holding that a loss-carryback claim was not transferable. *Ideal* held that an assignment of a claim for refund of customs duties was not enforceable between the parties until the government allowed the claim, and hence that the assignment was not sufficiently "perfected" prior to bankruptcy to prevent [fol. 48] it from being a voidable preference under § 60a of the Bankruptcy Act. 11 USCA, § 96a. The court did not deal with the meaning of transferability under § 70a(5), nor did the court suggest that the assignee could not have enforced his assignment once the refund had been paid by the government. The *Wooten* case, as applicable here, es-

tablished no more than that the Assignment Act bars a direct suit by the assignee against the government.

Finally, we are of the opinion that the argument pressed here, and accepted in *Sussman,* proves too much. If the Assignment of Claims Act defeats the transferability of an inchoate claim for a loss-carryback refund, it should by the same logic render all tax claims against the United States non-transferable for Bankruptcy Act purposes. The Assignment Act would apply with equal force to all claims for tax refund, including those presently due and fixed in amount. They too must meet the transferability prerequisite of § 70a(5). Yet, it is established that the bankruptcy trustee succeeds to any accrued claim or right of action for tax refund the bankrupt may have against the government. 4 Collier, Bankruptcy ¶ 70.28[4], at 1250, and cases cited at note 27.[7] See also *In re Goodson,* S.D. Cal. 1962, 208 F.Supp. 837.

[fol. 49] For the foregoing reasons, we hold that an inchoate right to receive a loss-carryback refund is "property", and that it is property which the bankrupt could "by any means have transferred" within the meaning of § 70a(5) of the Bankruptcy Act. Consequently, the refund proceeds belong to the trustee.

Affirmed.

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[7] Collier cites *Chandler* v. *Nathans,* 3 Cir., 1925, 6 F.2d 725, which held that a refund claim was a "right of action . . . [for] the unlawful taking or detention of . . . property" within § 70a(6). This subsection contains no transferability requirement. The other cases cited by Collier do not specify whether the refund claim was deemed to pass to the trustee under § 70a(5) or under § 70a(6). In most tax refund cases, the government is not disputing that the taxpayer is entitled to return of the overpayment. Consequently, the "unlawful . . . detention of . . . property" language of § 70a(6) seems inappropriate, and such claims fall more comfortably within the general language of § 70a(5).

[fol. 50]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1963

No. 21043

D. C. Docket No. 4951, 4952 & 4953—Bkcy.

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al., Appellants,

versus

WILLIAM J. ROCHELLE, JR., Trustee, Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before Rives, Bell and Wright,* Circuit Judges.

JUDGMENT—September 9, 1964

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

* Of the D. C. Circuit, sitting by designation.

It is further ordered and adjudged that the appellants, Gerald Segal, Individually and d/b/a Segal Cotton Products, and others, be condemned to pay, in solido, the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 9, 1964

Issued as Mandate: Oct 23 1964

[fol. 52]

In the United States Court of Appeals

For the Fifth Circuit

No. 21,043

[Title omitted]

Appellants' Motion for Re-hearing—
Filed September 30, 1964

To the Honorable Judge of Said Court:

Now comes Appellants in the above styled and numbered cause and file this their motion for re-hearing and say:

That on September 9th, 1964 this Honorable Court delivered its opinion and judgment in the above cause, and these Appellants say that the Court erred in the following respect:

Points of Error

The Court erred in its finding and determination that the trustee in bankruptcy as opposed to the bankrupts was entitled to the loss carry-back which had been paid for the entire calendar year of 1961.

[fol. 53] Syllabi of the Court's Opinion

The Court in its opinion reached the following conclusions, and based on such conclusions, justified its decision affirming the District Court below:

(1) That the loss carry-back adjustment is property as defined in Section 70a of the Bankruptcy Act, 11 U.S.C.A., Section 110a.

(2) That assuming the loss carry-back adjustment is property, such adjustment was transferable on the date of bankruptcy under Section 70a(5) of the Bankruptcy Act.

Argument

In the beginning of its opinion the Court stated that this appeal presented a question of prime importance in the administration of the Bankruptcy Act. After a short review of two cases which had held that the loss carry-back adjustment passed to the bankrupts rather than the trustee, (*In re*: *Sussman,* 3 Cir. 1961, 289 F. 2d, 77, and *Fournier* v. *Rosenblum,* 1 Cir. 1963, 318 F. 2d, 525) the Court set forth that it was the intent of Congress to secure to creditors all property of the bankrupt. It was then set out by the Court that the result in holding for the bankrupts here would be that such refunds would pass to the bankrupts freed from claims of their creditors, if such a right, as is in question in this case, was found to be outside the scope of the definition of transferable property as used in the Act. The Court concluded that this result would arise in spite of the fact that the refunds arose as [fol. 54] a result of the losses in the partnership business which gave rights to the claims of the creditors. The thing that the Court possibly overlooked in following this line of thinking, is that the principle of law which is made by their decision affects all refunds in the future, including those which could result from losses of a business operated subsequent to the discharge of the bankrupts, thus because the decision may result in a windfall in the present case is

not reason enough to bypass the explicit language of the Bankruptcy Act through the weaving of various unrelated decisions.

This Honorable Court in arriving at the conclusion that the loss carry-back adjustment is property within the language of Section 70a(5), cited several cases dealing with various types of rights of action which were held to be property. The Court cites *William* v. *Heard* 1891, 140 U. S. 529; *In re*: *Dorgan's Estate*, 1916, 237 F. 507; *Kleinschmidt* v. *Schroeter* 1938, 94 F. 2d 707; *Chandler* v. *Nathans* 1925, 6 F. 2d, 725, and *In re*: *Kepp Electric & Manufacturing Corporation*, 1951, 98 Fed. Supp. 51. Each of these cases cited by the Court have one thing in common, which does not apply to the case at bar. In each of these cases the right of action itself, or the right to the property was definite at the time of bankruptcy. In the *Williams* v. *Heard* case, supra, the right to the award arose some four years prior to bankruptcy and therefore was in existence at the time of bankruptcy, only the amount was contingent on the determination of Congress. In the case of *In re*: *Dorgan's Estate*, supra, the property right was clearly in [fol. 55] existence at the time of bankruptcy, again only the amount was questionable. That case resorted to special reasoning to support its decision. The Court stated in its opinion in the Dorgan's case, supra, that regardless of the contingency of the amount and value that "nevertheless a property right existed, the value of which may be in a way approximated by taking into account the age of the widow and the prospective necessities of her life." Therefore, there was in that case the possibility of approximation of amount and value. There was no question of the existence of the right to the proceeds. Again in the *Kleinschmidt* v. *Schroeter* case, supra, the right to a return of proceeds existed prior to bankruptcy and only the amount recoverable was contingent. The same is true of the *Chandler* v. *Nathans* case, supra. The case of *In re*: *Kepp Electric & Manufacturing Corporation*, supra, did not deal with the question of "property." Thus, each of

the cases cited by the Court in support of the proposition that the loss carry-back adjustment in the case at bar is property as defined by Section 70a(5) of the Bankruptcy Act is distinguishable from the case at bar. In no way can it be said that the *right* to the adjustment was definite at the time of bankruptcy of the Appellants. There was no right in existence. Therefore, the amount recoverable was not the contingency but the right itself, unlike cited cases of the Court. Therefore, the Court's basic assumption based on its reasoning of cited cases that the loss carry-back adjustment was property under the definition of 70a(5) seems somewhat questionable when the principal of [fol. 56] the cited cases is held up to the facts of the principal case.

This Honorable Court, after making the determination that the loss carry-back adjustment was property under Section 70a(5) continued forward and determined that such property right was transferable under the language of Section 70a(5). The appellants contended in their argument before this Honorable Court that the assignment of claims act would render null and void the assignment of such a right of action against the United States. This argument and reasoning was accepted by the Third Circuit in the *Sussman* case, supra. This Honorable court avoided the decision in the *Sussman* case, supra, and the reasoning used therein with its resort to the *In re: Kepp Electric & Manufacturing Corporation* case, supra. This Honorable Court relied entirely upon that case in its determination that the loss carry-back adjustment right was a transferable right. The *Kepp* case supra however, dealt with an entirely different question than the case at bar. The question in the *Kepp* case was whether a bankrupt could assign *monies* to be received from a claim against the Government and did not deal with the question of the assignment of the right itself as does this case. The reasoning used by this Court in bypassing the *Sussman* decision completely avoids the clear language of Section 70a(5) which speaks of "rights of action, which * * * could by any means have (been) transferred * * *".

This Honorable Court has by its reasoning and citing of various cases bypassed two well considered opinions by [fol. 57] other circuits, namely the Third Circuit and the First Circuit which had before them the very question which arises out of the case at bar. Appellants say that the language of Section 70a(5) of the Bankruptcy Act should be strictly adhered to and that the reasoning of this Court avoids such language.

Wherefore, Premises Considered, your Appellants pray this Honorable Court consider this motion for re-hearing, and upon re-hearing hereof this Court reverse the decision below and it be held that the bankrupts are entitled to the loss carry-back refund in question in this case, and for such other relief, both general and special, at law and in equity, to which Appellants are justly entitled.

Respectfully submitted,

Henry Klepak, Roy J. True, Attorneys for Appellants, 1509 Mercantile Bank Bldg., Dallas 1, Texas.

Certification

I hereby certify that a true and correct copy of this motion for re-hearing has been delivered to William J. Rochelle, Jr., Trustee, Republic National Bank Building, Dallas, Texas.

Henry Klepak

[fol. 58]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21043

[Title omitted]

Appeal from the United States District Court for the Northern District of Texas

ORDER EXTENDING TIME TO FILE PETITION FOR REHEARING

It Is Ordered that appellants be granted an extension until October 9, 1964, within which to file a petition for rehearing in the above entitled and numbered cause.

Griffin B. Bell, U. S. Circuit Judge

(Original Filed October 1, 1964)

[fol. 59]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21,043

[Title omitted]

Appeal from the United States District Court for the Northern District of Texas

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Before Rives, Bell, and Wright,* Circuit Judges.

ORDER DENYING PETITION FOR REHEARING—October 12, 1964

Per Curiam:

It is Ordered that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby Denied.

Petition for Rehearing filed: 9/30/64

Petition for Rehearing denied: 10/12/64

[fol. 60] Clerk's Certificate to foregoing transcript (omitted in printing).

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* Of the D. C. Circuit, sitting by designation.

[fol. 61]

SUPREME COURT OF THE UNITED STATES

No. 817—October Term, 1964

GERALD SEGAL, individually and d/b/a SEGAL COTTON PRODUCTS, et al., Petitioners,

v.

WILLIAM J. ROCHELLE, JR., Trustee.

ORDER ALLOWING CERTIORARI—March 8, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.